No. 914

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Petitioner,

vs.

MAE G. CHAPMAN,
Respondent.

PETITION FOR A WRIT OF CERTIORARI
and
SUPPORTING BRIEF AND ARGUMENT.

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MAY IT PLEASE THE COURT:

SUMMARY STATEMENT OF THE MATTER INVOLVED.

Petitioner, New York Life Insurance Company, instituted this suit in the United States District Court for the Eastern District of Missouri on January 23, 1941 (R. p. 2), to cancel a policy of life insurance for $10,000 issued to Abel W. Chapman, in which respondent was the beneficiary.

On February 17, 1940, at St. Louis, Missouri, Chapman made written application to petitioner for a policy for $10,000 and requested in that application that the premiums on the policy should be payable annually and that the policy should take effect as of the date on which it was written (R. p. 65). He agreed in that application that the policy so applied for should not go into force "unless and until the policy is delivered to and received by the applicant and the first premium thereon is paid in full during his lifetime, and then only if the applicant has not consulted or been treated by any physician or practitioner since his medical examination" (R. p. 66). On the same date, February 17, 1940, Chapman was examined by petitioner's medical examiner at St. Louis, Missouri for this policy (R. p. 56).

Chapman's application was accepted by petitioner at its home office in New York City on March 4, 1940 (R. p. 70), on which date petitioner issued its policy for $10,000, which provided, as Chapman had requested in his application, for the payment of an annual premium of $389.50 and that the effective date of the policy was March 4, 1940 (R. p. 72).

On March 17, 1940, when petitioner's soliciting agent, William J. Cusick, undertook to deliver this policy to Chapman, at Belleville, Illinois, where Chapman resided, the latter informed him that he could not pay the first annual premium and that he wanted the premiums on the policy payable monthly instead of annually. Cusick told him that this could be arranged and that the monthly premium would be $34.70 (R. p. 106). Chapman thereupon paid Cusick the first monthly premium of $34.70 and Cusick returned the policy to the home office of petitioner in New York City (R. pp. 106-107), where, on March 20, 1940, it was rewritten and reissued by petitioner on a monthly premium basis (R. pp. 71, 73, 48). The reissued

policy, which is dated March 20, 1940, provided that its effective date was March 17, 1940 (R. p. 48), instead of March 4, 1940, the effective date of the original policy (R. p. 72).

Following Chapman's death on August 9, 1940 (R. p. 98), petitioner learned that he had, between February 17, 1940, and March 17, 1940, consulted Dr. William H. Walton for stomach pains and that Dr. Walton had found, upon a gastrointestinal examination of Chapman on March 16, 1940, that he was afflicted with a duodenal ulcer (R. pp. 75-76). As the policy provided that it would be incontestable after two years from its date of issue, petitioner, within that period, filed this suit, in which it alleged (R. pp. 10-15) that the policy was a New York contract; that under the New York law it was Chapman's duty to disclose to petitioner not only that he had consulted and been treated by a physician between February 17, 1940, and March 17, 1940, but also that it was his duty to disclose to petitioner prior to March 20, 1940, the date of the issuance of said policy, that he was afflicted with a duodenal ulcer and that his failure so to do constituted a fraud upon petitioner and a breach of good faith on his part.

It was established without dispute or contradiction at the trial that Chapman had consulted Dr. Walton on March 12, 1940 (R. p. 83); that Dr. Walton instructed him to return on March 16, 1940, for a gastrointestinal examination, which Dr. Walton performed on that date and which took about eleven hours (R. p. 85); that Dr. Walton, as the result of his examination of Chapman on March 16, 1940, suspected that he was afflicted with a duodenal ulcer (R. p. 88) and that his suspicion in that respect was confirmed by a laboratory report of a gastric analysis which was received by Dr. Walton on March 18, 1940, and on that date Dr. Walton advised Chapman of his affliction with a duodenal ulcer (R. p. 89).

The respondent filed a counterclaim to recover on the policy in the District Court (R. p. 21) and, although a jury was summoned to try the issues (R. p. 47) nevertheless, at the close of all the evidence a jury was waived and the case was submitted to the Court (R. p. 127). The District Court found in favor of respondent on petitioner's cause of action and ordered a dismissal of the petition. The District Court likewise found in favor of respondent and against petitioner on respondent's counterclaim and entered judgment against petitioner on that counterclaim for the sum of $9,965.30 (R. pp. 29-30). The judgment of the District Court was affirmed by the United States Circuit Court of Appeals (R. p. 143).

THE HOLDING OF THE COURT OF APPEALS.

The Court of Appeals held that the policy which petitioner sought to have canceled was an Illinois and not a New York contract. The basis for this holding by the Court of Appeals was:

1. Cusick as the soliciting agent of petitioner was authorized to deliver to Chapman in Illinois the policy of March 4, 1940; that when Cusick called on the insured at Belleville, Illinois, on March 17, 1940, to deliver that policy his power and authority to change and modify the policy on petitioner's behalf was determinable by the law of Illinois; that notwithstanding the agreement of Chapman in his application for that policy that "only the President, a Vice-President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts or waive any of the Company's rights or requirements," nevertheless under the Illinois law the soliciting agent of a life insurance company may bind the company by immaterial changes in the policy; that on March 17, 1940, Cusick at Belleville, Illinois, agreed that the premiums on the policy which had been issued by petitioner on

March 4, 1940, should be payable monthly instead of annually and also that the effective date of that policy should be March 17, 1940, instead of March 4, 1940, and that these were immaterial changes or modifications of the policy of March 4, 1940, which Cusick, under the Illinois law, had the power and authority to make on petitioner's behalf notwithstanding Chapman's agreement in the application for that policy that a soliciting agent should have no power or authority to make or modify any contract on petitioner's behalf. Therefore as Cusick in Illinois had on March 17, 1940, changed and modified the policy of March 4, 1940, in these particulars the Court of Appeals held that that policy became effective in Illinois on March 17, 1940, when Chapman paid the first monthly premium of $34.70 on the policy of March 4, 1940, as so modified.

2. The Court of Appeals also held that even on the assumption that Cusick, the soliciting agent, had no authority on petitioner's behalf to change or modify the policy of March 4, 1940, by providing that the premiums thereunder should be payable monthly in the sum of $34.70 instead of annually in the sum of $389.50, nevertheless, "when the company accepted the monthly premium and the succeeding monthly premiums it ratified the agent's act, and such act related back to the date and place of said act" (R. p. 140).

REASONS RELIED ON FOR ALLOWANCE OF WRIT.

1. The holding of the Court of Appeals that the policy which petitioner sought to have canceled was an Illinois, and not a New York, contract is contrary to the holding of the Illinois courts and also to the holding of this Court. This involves an important question of conflict of law which ought to be finally determined by this Court.

2. The application by the Court of Appeals of the Illinois law in the determination of petitioner's obligations under a policy of life insurance which was a New York contract deprives petitioner of its property without due process of law in violation of the Fourteenth Amendment to the Federal Constitution.

3. The holding of the Court of Appeals that under the law of Illinois the soliciting agent had the right and power on petitioner's behalf to change and modify a policy of life insurance, despite the provision and agreement of the insured in his application for said policy that only certain designated executive officials of petitioner were authorized to make or modify contracts on its behalf, by providing that the premiums on the policy shall be payable monthly instead of annually and that the effective date of the policy should be March 17, 1940, instead of March 4, 1940, is contrary to the law as announced by the Illinois courts.

4. The holding of the Court of Appeals that even if petitioner's soliciting agent had no authority on petitioner's behalf to change the premiums payable under the policy of March 4, 1940, from an annual to a monthly basis, nevertheless, the petitioner ratified this unauthorized change or modification of that policy by the soliciting agent by its acceptance of the first and subsequent monthly premiums is contrary to and in conflict with the rule of law in Illinois that a principal cannot be held to have ratified an unauthorized act of an agent in the absence of evidence that the principal knew of the unauthorized act of the agent at the time of his alleged ratification thereof.

Wherefore, your petitioner prays that a writ of certiorari be issued by this Court to the United States Circuit Court of Appeals for the Eighth Circuit directing that court to certify and send to this Court for its review and deter-

mination, a full and complete transcript of the record and all proceedings in New York Life Insurance Company, a Corporation, Appellant, v. Mae G. Chapman, Appellee, and that the judgment of the United States Circuit Court of Appeals for the Eighth Circuit in said cause be reversed by this Court.

NEW YORK LIFE INSURANCE COMPANY,
a Corporation,

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BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

OPINION OF COURT OF APPEALS.

The opinion of the Circuit Court of Appeals, Eighth Circuit, is reported in 132 F. (2d) 688, and is set out on pages 123 to 142 of the record filed herein.

II.

JURISDICTION.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925, 43 Stat. 938 (28 U. S. C. A., Sec. 347).

The judgment of the Circuit Court of Appeals, Eighth Circuit, affirming the judgment of the District Court for the Eastern District of Missouri, was rendered on January 14, 1943 (R. 143), and petition for a rehearing was denied on March 4, 1943 (R. p. 179). Thirty days' stay of mandate was granted on March 16, 1943 (R. p. 179).

The following cases are believed to sustain the jurisdiction of this Court:

Erie Railroad Company v. Tompkins, 304 U. S. 64;
Aetna Life Ins. Co. v. Dunken, 266 U. S. 389;
New York Life Ins. Co. v. Head, 234 U. S. 149;
Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143.

III.

STATEMENT OF CASE.

In the petition for the writ is a statement of the case so far as it is material to a consideration of the questions presented, and in the interest of brevity a statement of the case is not repeated here.

IV.

SPECIFICATION OF ERRORS.

Petitioner assigns the following errors for a reversal of the judgment of the Court of Appeals:

1. The Court of Appeals erred in holding that the policy sought to be canceled by petitioner was an Illinois, and not a New York, contract because:

Under the terms of the application of February 17, 1940, the policy therein applied for was not to become effective until the first premium thereon was paid. The applicant did not pay the first annual premium on the policy which was issued on that application and his failure so to do and his request that the premiums on that policy should be payable monthly, instead of annually, was a rejection of that policy, and a counterproposal by the applicant, that the policy so applied for on February 17, 1940, should be issued on a monthly, instead of on an annual, premium basis, with the result that there was never any contract or policy of insurance until March 20, 1940, when petitioner complied with the applicant's request that the policy should be issued on a monthly, instead of on an annual, premium basis. Under the terms of the application of February 17, 1940, if the first premium on the policy therein applied for was paid at the time of the application, the policy was to become effective upon the Company's approval of that application (R. p. 66). Since the first monthly premium on the policy issued by petitioner on March 20, 1940, was paid on March 17, 1940, the insurance under that policy became effective on March 20, 1940, when petitioner at its home office in New York City accepted the applicant's request that the policy of March 4, 1940, should be changed or reissued on a monthly, instead of on an annual, premium basis. Consequently, the policy was a New York, and not an Illinois, contract, and the Court of Appeals should

have applied the law of New York, instead of the law of Illinois, in the determination of the question whether petitioner was entitled to a cancellation of that policy.

Griffen v. McCooch, 313 U. S. 498, 85 L. Ed. 1481;
Yeats v. Dodson, 345 Mo. 196, 127 S. W. (2d) 652;
Kellogg v. National Protective Life Ins. Co. (Mo. Ap.), 155 S. W. (2d) 512.

2. The Court of Appeals erred in holding that under the Illinois law the soliciting agent of a life insurance company is authorized to change or modify a contract of insurance on the company's behalf by providing that the premiums on the policy should be payable monthly instead of annually and that the policy should become effective on a date subsequent to that stated in the policy, notwithstanding the agreement of the insured in his application for the policy that only certain designated executive officers of the company were authorized or empowered to make or modify contracts on the company's behalf. This holding is not sustained by, but is contrary to, the law as announced by the Illinois courts.

Sommario v. Prudential Ins. Co., 289 Ill. Ap. 520, 7 N. E. (2d) 631;
Rozgis v. Missouri State Life Ins. Co., 271 Ill. Ap. 155;
Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516;
Covenant Mutual Life Ins. Co. v. Conway, 10 Ill. Ap. 348;
Pralle v. Metropolitan Life Ins. Co., 346 Ill. 58, 178 N. E. 371, affirming 252 Ill. Ap. 460;
Rummler v. Metropolitan Life Ins. Co., 316 Ill. Ap. 362, 45 N. E. (2d) 86;
Rocca v. Metropolitan Life Ins. Co., 300 Ill. Ap. 592, 21 N. E. (2d) 849;
Phoenix Ins. Co. v. Maxson, 42 Ill. Ap. 164;
Slocum v. New York Life Ins. Co., 228 U. S. 364.

3. The application by the Court of Appeals of the law of Illinois, instead of the law of New York, in determining the right of petitioner to a cancellation of the policy, deprived petitioner of its property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States, because the law of Illinois cannot constitutionally be applied in determining the rights and obligations of the parties under a New York contract.

Aetna Life Ins. Co. v. Dunken, 266 U. S. 389;
New York Life Ins. Co. v. Head, 254 U. S. 149;
Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143.

4. The Court of Appeals erred in holding that even if petitioner's soliciting agent had no authority to change the premiums payable under the policy of March 4, 1940, from an annual to a monthly basis, nevertheless petitioner ratified the soliciting agent's unauthorized change or modification of that policy in this respect by its acceptance of the first and subsequent monthly premiums on the policy of March 20, 1940, because there is no evidence that petitioner, when it accepted the first or subsequent monthly premiums on the policy, knew that its soliciting agent had undertaken on its behalf to change or modify the policy of March 4, 1940, by providing that the premiums thereunder should be payable monthly instead of annually. This holding of the Court of Appeals is contrary to the holding of the courts of Illinois, as well as to the holding generally, that a principal will not be held to have ratified the unauthorized acts of an agent in the absence of any evidence that the principal knew of the unauthorized act of the agent at the time of his alleged ratification thereof.

Morse v. Illinois Power & Light Co., 294 Ill. Ap. 498, 14 N. E. (2d) 259;
Erie Ry. Co. v. Johnson (C. C. A. 6), 106 F. (2d) 550.

ARGUMENT.

I.

The policy was a New York, and not an Illinois, contract.

Since this suit was instituted in the District Court in Missouri, the Missouri conflict-of-laws rule was controlling (Griffen v. McCooch, 313 U. S. 498, 85 L. Ed. 1481).

In Missouri the law of the state where the policy became effective determines petitioner's right to a cancellation of the policy. In Yeats v. Dodson, 345 Mo. 196, 206, 127 S. W. (2d) 652, 656, the Missouri Supreme Court said:

> "The policy became finally effective at Kansas City, Missouri, because the last act necessary to a completed contract was to be performed by the attorneys in fact, acting on behalf of the Ice Company and the other subscribers, to determine for them the kind of contract to be made and to make it for them (Daggett v. Kansas City Structural Steel Co., 334 Mo. 207, 65 S. W. [2d] 1036; Illinois Fuel Co. v. Mobile & Ohio Railroad Co., 319 Mo. 899, 8 S. W. [2d] 834, certiorari denied 278 U. S. 640; Pickett v. Equitable Life Assurance Society [Mo. Ap.], 27 S. W. [2d] 452; Fields v. Equitable Life Assurance Society [Mo. Ap.], 118 S. W. [2d] 521; 11 Am. Jur. 391-393, Sec. 107)."

In Kellogg v. National Protective Ins. Co. (Mo. Ap.), 155 S. W. (2d) 512, 514, the Court said:

> "It would appear to follow that the last act done to make a binding contract was done in Missouri and therefore the contract must be construed and governed by the laws of Missouri."

In his written application on February 17, 1940, Chapman requested that the premiums on the policy therein applied for should be payable annually and that the policy should

be dated on the date that it was written (R. p. 65). It was also provided in that application:

> "That the insurance hereby applied for shall not go into force unless and until the policy is delivered to and received by the applicant and the first premium paid thereon during his lifetime, and then only if the applicant has not consulted or been treated by any physician or practitioner since his medical examination, and thereupon the policy shall be deemed to have taken effect as of the date specified under 3 above (the date that the policy was written); provided, however, that if the applicant, at the time of making this application, pays the soliciting agent in cash the full amount of the first premium for the insurance hereby applied for, and so declares in this application and receives from the soliciting agent a receipt therefor on the form attached as a coupon to this application and corresponding in date and number herewith, and if the Company, after medical examination and investigation, shall be satisfied that the applicant was, at the time of making this application, insurable * * * then said insurance shall take effect and be in force * * * from and after the time this application is made, whether the policy be delivered to and received by the applicant or not" (R. p. 66).

As Chapman did not pay the first premium at the time of that application, the policy, under the foregoing provision of the application, was not to become effective until it was delivered and the first premium thereon was paid.

That application was accepted by petitioner on March 4, 1940, on which date it issued the policy therein applied for and mailed the same to its St. Louis, Missouri, office. That policy, as Chapman had requested in his application, provided that it was issued in consideration of the payment in advance of an annual premium of $389.50 and that its effective date was March 4, 1940 (R. pp. 72-73). On March 17, 1940, Mr. Cusick, the soliciting agent, called on Chap-

man at his home in Belleville, Illinois, to deliver the policy and to collect the first premium. Chapman, however, told him that he could not pay the first premium and that he wanted the premiums on the policy to be payable monthly instead of annually. Mr. Cusick informed Chapman that this could be arranged, although it would cost Chapman more money. Chapman stated, however, that this was the only way he could handle the matter, and, upon being advised by Mr. Cusick that the monthly premium would be $34.70, Chapman gave Cusick a check for that amount (R. pp. 106-107) and Mr. Cusick gave Chapman the following receipt (R. p. 111):

"March 17, 1940

Received of A. W. Chapman policy #17558729 in order to change to monthly rate basis and redate policy as of to-day.

Wm. J. Cusick, Agent
New York Life Ins. Co."

Cusick thereupon returned the policy to the petitioner's home office in New York City, and, upon its receipt there on March 20, 1940 (R. p. 71), petitioner inserted in the original application, under the heading of "Additions or Amendments (for home office use only)," a statement that the premiums were to be payable monthly and that insurance was to take effect as of March 17, 1940 (R. p. 73), instead of March 4, 1940, destroyed the policy of March 4, 1940 (R. p. 71), and issued another policy dated March 20, 1940, which provided that it was issued in consideration of the payment of a monthly premium of $34.70, instead of an annual premium of $389.50, and that its effective date was March 17, 1940, instead of on March 4, 1940 (R. p. 48). That policy was then mailed to the company's St. Louis office (R. p. 74), and upon its receipt at that office it was mailed to the insured at Belleville, Illinois (R. p. 108).

On these facts the Court of Appeals held that the policy was an Illinois, and not a New York, contract (R. p. 140). In arriving at that conclusion the Court of Appeals held that when Cusick, on March 17, 1940, at Belleville, Illinois, undertook to deliver the policy of March 4, 1940, to Chapman, and when he was advised by Chapman that he could not pay the first premium thereon, Cusick thereupon changed or modified that policy by providing for the payment of a monthly premium of $34.70 instead of an annual premium of $389.50, and that the effective date of the policy should be March 17, 1940, instead of March 4, 1940 (R. pp. 134, 140), and that his modification of the policy in these respects was binding on petitioner under the Illinois law despite Chapman's agreement in the application for that policy that "only the President, a Vice President, a Secretary or the Treasurer of the Company can make, modify or discharge contracts, or waive any of the Company's rights or requirements" (R. p. 66).

The Court of Appeals held that under the law of Illinois the soliciting agent of a life insurance company, even though the applicant for the policy had agreed in his application that the soliciting agent had no authority to make or modify a policy on the company's behalf, may nevertheless bind the company by policy changes which are "not material" (R. p. 140), and that Cusick's agreement that the premium on this policy should be a monthly premium of $34.70 instead of an annual premium of $389.50, and that the effective, and anniversary, date of the policy should be March 17, 1940, instead of March 4, 1940, were immaterial changes which were binding upon the company.

The Court of Appeals cites John Hancock Mutual Life Ins. Co. v. Schlenk, 175 Ill. 224, 51 N. E. 795; Guter v. Security Benefit Life Ins. Co., 335 Ill. 174, 166 N. E. 521; Bennati v. John Hancock Mutual Life Ins. Co., 201 Ill. Ap. 438, 8 N. E. (2d) 551, and Mulligan v. Metropolitan Life Ins. Co., 149 Ill. Ap. 516, in support of its holding

that under the Illinois law the soliciting agent of a life insurance company can bind the company by changes in the policy which are not "material or prejudicial" to the company, even though the applicant has agreed in his application for the policy that a soliciting agent has no power or authority to make **any** change or modification of the policy on the company's behalf. None of those cases supports that holding.

In the **Schlenk** case the policy was applied for on August 7, 1895, and the applicant died on August 12, 1895. At the time of the application it was agreed between the agent, who was a **general**, and not a soliciting, agent, as was Cusick, and the applicant that for the first premium on the policy the agent would accept a sewing machine from the applicant and would also assume, and cancel, an indebtedness of $18 owing by a third person to the applicant, and that the difference between the amount of the premium and the value of the sewing machine and the indebtedness to be assumed by the agent would be paid by the applicant in cash.

When the agent received the policy he took it to the applicant's place of business, but, finding that the latter was ill, called on the applicant's brother and told him about his previous understanding with the applicant and that he would deliver the policy upon the payment of $25, which was the amount of the first premium that the agent was required to pay the company after the deduction of his commission. The applicant's brother thereupon paid the agent the sum of $25 and the agent delivered the policy to him.

The policy contained a clause that it was not to become effective unless it was delivered to the applicant during his lifetime and good health, and one of the issues in the Schlenk case was whether the policy took effect upon its delivery to the applicant's brother, when the agent knew that the applicant was ill. The other question at issue in

that case was whether agent was authorized to accept payment of the first premium partly in cash and partly in merchandise.

On the first issue the Court held that as the agent was the company's agent for the delivery of the policy, and as he had delivered the policy with knowledge that the insured was ill, the company had thereby waived the requirement of the policy that it was not to become effective unless the applicant was in good health at the time of its delivery. That holding, however, has no application here for several reasons. In the first place, the agent in the Schlenk case was, and advertised himself as, a "general agent" and the applicant had no knowledge that he was other than a general agent. In the case at bar, on the other hand, Mr. Cusick had never held himself out, or advertised himself, as being a general agent of petitioner. In the second place, while the **policy** in the Schlenk case limited and restricted the authority of agents, it does not appear that the **application** for that policy contained any such restriction. Consequently, the applicant in the Schlenk case could not have known of any restriction on the power or authority of the agent in that case until he received the policy and the acts of the agent on which a waiver was predicated all occurred **before** the **policy** was **delivered** the applicant. In the case at bar, on the other hand, Chapman was informed in his application for the policy that Cusick had no power or authority to make or modify any contract on the company's behalf, so that Chapman knew when Cusick called to deliver the policy to him on March 17, 1940, that Cusick had no power or authority to change or modify that policy. In the third place there is a fundamental distinction between the power of an agent **to change or modify a contract of insurance on the company's behalf** and his power to **waive** a **condition** of the policy concerning which the agent is empowered to

act on the company's behalf. Consequently the holding in the Schlenk case that the delivery of the policy by the agent with knowledge that the applicant was ill was a waiver of the condition of the policy that it was not to take effect unless the applicant was in good health at the time of the delivery, is no authority for the holding in the case at bar that Cusick, despite the restriction on his authority in the application, could nevertheless bind the company by the changes which he is alleged to have made in this policy.

On the second issue in the Schlenk case the Court held that since the agent had received in cash that portion or part of the first premium which was payable to the company, the latter could not complain, and was in no way prejudiced, because the agent had agreed to accept merchandise instead of cash for his portion of that premium.

Clearly, therefore, the Schlenk case does not support or justify the holding of the Court of Appeals in the case at bar that Cusick was authorized to change or modify the policy of March 4, 1940, by providing that the premiums under that policy should be payable monthly instead of annually and that that policy should become effective on March 17, 1940, instead of on March 4, 1940.

Guter v. Security Benefit Life Ins. Co. (335 Ill. 174, 166 N. E. 521) is likewise without application here. That case was an action on a policy issued by a fraternal society which claimed that the policy had been procured through false and fraudulent representations on the part of the insured in his application that neither of his parents had died from tuberculosis. There was evidence in that case that the medical examiner of the society was informed when he examined the insured for the policy that both of insured's parents had died of tuberculosis, notwithstanding which the medical examiner stated in the application that both of insured's parents had died from some other ail-

ment. The Illinois court held under these circumstances that the knowledge of the society's medical examiner was the knowledge of the society, that the insured's parents had died from tuberculosis, and that the society in issuing the policy with that knowledge had waived the right to assert the falsity of this representation in avoidance of the policy.

Manifestly, the holding in the Guter case does not support or sustain the holding of the Court of Appeals in the case at bar that Cusick was authorized to change or modify the policy of March 4, 1940, by providing for the payment of premiums monthly instead of annually or that the policy should become effective from March 20, 1940, instead of from March 4, 1940.

The Benatti case (201 Ill. App. 438, 8 N E. [2d] 551) likewise does not support the holding of the Court of Appeals that the soliciting agent of a life insurance company, under the Illinois law, can bind the company by "immaterial" changes in the policy of insurance despite the restriction in the application on the authority of the agent to make or modify contracts on the company's behalf. On the contrary, the Benatti case repudiates that holding.

The Benatti case was an action on an industrial policy under which the premiums were payable weekly. In an action on the policy after insured's death the company defended on the ground that the policy had lapsed prior to insured's death for the nonpayment of a weekly premium which became due on February 20, 1935. An Illinois statute provided that the insured should be entitled to a grace period of one month for the payment of premiums. On March 22, 1935, the beneficiary mailed a check to defendant's district office for the premium due February 20, 1935, which was received at that office on March 23, 1935. The insured died on March 24, 1935, and the Court held that, as the premium due February 20, 1935, had been paid

within the statutory grace period, the policy was in force at the time of insured's death.

One of the contentions of the beneficiary in the Benatti case was that the company had waived the prompt payment of the premium due February 20, 1935, because its agent, with authority to collect and receive premiums, had collected and accepted prior premiums after their due date, and also because this agent had informed and advised the insured that the policy would not lapse if the premium was paid within a day or two after the expiration of the grace period. With respect to that contention the Court said (8 N. E. [2d], l. c. 554):

> "**Of course**, the **rule is** that an agent of an insurance company is **not empowered** to **change** the **provisions** of the contract. **This must be conceded,** but a company operating through its agents can be bound by the acts of its agents in waiving provisions providing payment of premiums. In support of this rule no citation of authority of courts of last resort are necessary."

It is one thing to hold, as was held in the Benatti case, that the soliciting agent of a life insurance company may waive, on the company's behalf, a condition of a policy concerning which he is authorized to act for and on the company's behalf. It is quite another thing, however, to hold that such an agent may bind the company by a change or modification of the policy, especially when, as here, the applicant was informed and notified in the application that such agents have no power or authority to make or modify contracts on the company's behalf. Clearly, therefore, the holding in the Benatti case that an agent with authority to collect and accept premiums on the company's behalf may waive the prompt payment of premiums due under the policy is no authority for the holding of the Court of Appeals in the case at bar that Cusick was authorized and empowered to change the premiums on this policy from

an annual to a monthly basis and to change the effective date of the policy from March 4, 1940, to March 20, 1940, and this despite the provision in the application that such agents were not authorized or empowered to make any changes or modification of policies on the company's behalf.

Mulligan v. Metropolitan Life Ins. Co., 149 Ill. App. 516, likewise does not support the holding of the Court of Appeals in the case at bar that Cusick was authorized to make these changes in the policy of March 4, 1940, despite the restriction on his authority in the application.

In the Mulligan case the Illinois court upheld an agreement by the soliciting agent to accept payment of the first premium in weekly installments instead of in one sum, but there was no agreement by the agent in that case that the premiums on the policy should be payable weekly instead of semiannually, as provided in the Mulligan policy. In other words, there was no attempt on the part of the soliciting agent in the Mulligan case to change or modify the policy. Furthermore, there **was no** provision in **either the** Mulligan **policy** or in the **application for that policy that soliciting agents had no power or authority to make or modify contracts on the company's behalf.**

Clearly, therefore, these cases do not sustain or support the holding of the Court of Appeals that Cusick, petitioner's soliciting agent, was authorized and empowered under the Illinois law to change the policy of March 4, 1940, in these particulars.

II.

Under the law of Illinois the soliciting agent of a life insurance company is not authorized or empowered to change or modify a policy on the company's behalf when the application for the policy expressly provides that the soliciting agent shall have no such authority.

The following cases in Illinois are contrary to the holding of the Court of Appeals in the case at bar that the soliciting agent of a life insurance company may change or modify contracts on the insurer's behalf despite a provision in the application for a policy that he shall have no such authority.

Sommario v. Prudential Ins. Co., 289 Ill. App. 520, 7 N. E. (2d) 631;
Rozgis v. Missouri State Life Ins. Co., 271 Ill. App. 155, 157;
Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516, 524;
Covenant Mutual Life Ins. Co. v. Conway, 10 Ill. App. 348, 353;
Pralle v. Metropolitan Life Ins. Co., 346 Ill. 58, 178 N. E. 371, affirming 252 Ill. App. 460, 466;
Rummler v. Metropolitan Life Ins. Co., 316 Ill. App. 362, 45 N. E. (2d) 86;
Rocca v. Metropolitan Life Ins. Co., 300 Ill. App. 592, 21 N. E. (2d) 849;
Phoenix Ins. Co. v. Maxson, 42 Ill. App. 164.

In the Sommario case, supra, the Illinois Court said (7 N. E. [2d], l. c. 633):

> "It is known from common experience that all solicitors of insurance, no matter how limited their authority may be, are authorized to accept an application and the payment of the initial premium, and to forward same to the proper office, and, when the policy is issued, to deliver it to insured, but this does **not** con-

stitute them **general agents if their authority is in fact otherwise limited**, and in order to show that a solicitor has broader powers, or the powers of a general agent, it is incumbent upon the party so contending to show, by competent evidence other than the testimony of the agent himself, the specific authority claimed."

In Winnesheik Ins. Co. case, supra, the Illinois Supreme Court said (53 Ill., l. c. 524):

"The question then arises as to the power of these agents to make such a contract. The warrant of their authority is in the record. By that they were only authorized to receive applications for insurance in accordance with the instructions to agents, and to collect and transmit the premiums therefor. This was the extent of their authority, and no instructions have been shown from their principals authorizing them to go one step beyond this, nor is there any proof they ever did, or ever designed to go a step beyond * * *. We decide * * * **that any contract of insurance effected by the agents of appellants was not binding upon appellants, such contract not being within the scope of the authority with which they were vested by the company** * * *."

In the Pralle case, supra, the Illinois Supreme Court said (178 N. E., l. c. 374):

"While the authority of an agent to make oral contracts for fire insurance has been frequently upheld in this state (cases), there is no holding in this state that such authority exists on agents selling **health** and **accident** insurance."

In Rozgis, supra, the Court said (271 Ill. Ap. 155, 157):

"An agent having authority only to solicit applications and forward to home office, is a soliciting agent and **has no power to waive** the **provisions of a policy**

(Winnesheik Ins. Co. v. Holzgrafe, 53 Ill. 516; Parden v. Wasavary, 249 Ill. Ap. 327; Niedringhaus v. Aetna Life Ins. Co., 235 Ill. Ap. 254)."

In Covenant Mutual Benefit Assn. case, supra, the Court said (10 Ill. Ap., l. c. 353):

> "It is insisted here that there was a valid contract with the agent, and it is important to inquire whether the agent had power to make such a contract. **Life insurance agents are ordinarily only authorized to receive and forward applications for the approval of the company** * * *.
>
> "It is apparent in this case that the **agent had no such power**, and **even if he assumed it, the defendant would not be liable unless he had been held out as a general agent** and the circumstances were such as to warrant the deceased in supposing he possessed the power so assumed. But we think the deceased **had no such** warrant. The **usual course of business in life insurance and the powers ordinarily given to such agents, he is presumed to have known.**"

In the Rummler case, supra, the Appellate Court of Illinois held that an insurer was not bound by the agreement of its soliciting agent to reinstate a policy of insurance following its lapse when the policy provided, as did the application for the policy in the case at bar, that only certain designated officers of the company were authorized to make or modify contracts on the company's behalf. The Court said (45 N. E. [2d], l. c. 88):

> "The master who heard the evidence makes no factual finding as to the conversation between the plaintiff and Kritikson, but **he concluded that defendant was not bound by any statements made by its agents in connection with the** application **for reinstatement**, and **his conclusion** is **fortified** by a provision of the policy which could not have escaped plaintiff's attention if he read it, as he said he did, that **'no agent** is

authorized to waive forfeitures, **to alter or amend this policy,** to accept premiums in arrears or to extend the due date of any premium.' "

In the Rocca case, supra, the policy provided that "no agent is authorized to waive forfeitures or to make, modify or discharge contracts," and the Illinois Appellate Court, in holding that the company's agent had no power to change the terms of a policy issued by the company, said (21 N. E. [2d], l. c. 852):

> "So, in the instant case, the policy of insurance offered by plaintiff expressly shows that the agent had no power to change the terms of the policy, so far as payment and reinstatement was concerned, nor have we been able to find any testimony tending to prove that the agent had any power, excepting that which plaintiff said Seaman told her when he talked with her about the extension of her husband's policy. We are mindful of the rule, and if there were any evidence or any testimony from which any legal inference might be drawn, showing the agent had any authority to bind his principal, we would promptly reverse the trial court in its decision and direct that the case be heard before a jury, but we have been unable, after a most diligent search, to find any evidence which would justify our doing this. **The claimed conversation between Seaman, the agent,** and the **beneficiary could not be considered as evidence affecting the contract between the insured and the defendant company.**"

In the Phoenix Ins. Co. case, supra, a fire insurance policy contained a clause avoiding it if the insured premises became vacant and further provided that the only person authorized to waive the vacancy clause of the policy was the company's agent in Chicago. The Illinois Appellate Court held that a district agent of the company was not authorized to waive that clause of the policy and said (42 Ill. Ap., l. c. 170):

"Miller had no authority to waive the condition. An **authority could not be presumed** because appellee had been **advised** by the **terms** of the **policy** of the **only person** authorized to **waive it** and the manner of waiving it. * * *

"Where a **policy** already issued and delivered, which, **by the terms of the instrument, can** be waived only in writing and **by a certain officer** named, an **attempted** parol **waiver by another does not bind the insurance company. Nor** is it **competent** to show by a contemporaneous verbal **arrangement made by a special agent of the company, another different and contradictory agreement was made which modified or altered** the **condition contained** in the **policy** * * *.

"**Before** the making of the alleged statement by Miller, **she had knowledge of the contents of the policy and the limitation of authority to waive the vacancy condition, or at least ample opportunity to possess herself of such knowledge.** * * *

"In this case not only was the **modification** contended for with reference to the future conduct of the assured, **other and different** from the then **existing state of affairs, but** was made **by an agent whom the assured had been notified had no authority to make such modification.** Where the **assured** is **notified of the limitation of the authority of the agent,** the **former cannot rely upon the statement of the latter in excess of his authority.**"

There is no evidence and no claim in the case at bar that Cusick had ever been held out as being a "**general** agent" of petitioner or that he had ever previously undertaken to make, change or modify policies or contracts of insurance on petitioner's behalf.

No Illinois authority is cited by the Court of Appeals in support of its holding that under the law of Illinois the change of the premiums on the policy from an annual to a monthly basis and the change in the effective date of the policy from March 4, 1940, to March 20, 1940, were "immaterial" changes in that contract.

Clearly the amount of the premium and its mode of payment is an essential and material term of a contract of insurance and, even if it was the law of Illinois, which it is not, that a soliciting agent may bind the company by immaterial changes in the policy despite a provision of the application that he shall have no authority to make any change or modification of the policy, that rule of law would not apply to the changes in the policy of March 4, 1940, which are claimed to have been made by Cusick on petitioner's behalf.

In Slocum v. New York Life, 228 U. S. 364, the policy provided for the payment of an annual premium of $579.60. For the premium due on November 27, 1907, the insured paid the company's agent the sum of $264.20 in cash and agreed to execute a premium or "blue" note for the balance of that premium. The insured, however, died before that note could be executed. The Court held that the agent's acceptance of the sum of $264.20 did not constitute a partial payment of that premium and said (l. c. 374):

> "The policy plainly provided for the payment of the stipulated premium annually within the month of grace following the due day, **and as plainly excluded any idea that payment could be made in installments distributed through the year.** Concededly, there was no payment of the whole of the premium in question, and as a partial payment was not within the contemplation of the policy, nothing was gained by handing to the agent the check for $264.20, unless what he did in that connection operated as a waiver of full and timely payment."

The policy in the Slocum case provided, as here, that the agent should have no power or authority to make or modify contracts in the company's behalf and the Court in holding that the agent had no authority, in view of this restriction in the policy, to waive the payment in full of that premium, said (l. c. 374):

"One who deals with an agent knowing that he is clothed with a circumscribed authority and that his act transcends his powers, cannot hold his principal; and this is true whether the agent is a general or a special one, for a principal may limit the authority of one as well as of the other.

"Under the terms of the policy, as qualified by the practice of the company, the agent was without authority to waive full and timely payment of the premium, save as he could adjust the payment conformably to the blue note plan. His authority turned upon the giving of the note, which was a matter of real substance, and not of mere form, as is shown by the terms of the note, before quoted. See White v. New York Life Ins. Co., 200 Mass. 510. Without it he could neither accept a partial payment nor extend the time of paying the balance. No note was given and so no waiver resulted from his acts. The insured and his wife could not reasonably have understood it otherwise, for they knew the terms of the policy and were familiar with the qualifying practice."

And in further holding that the Slocum case could not be submitted to the jury on the theory of a ratification by the company of an acceptance by its agent of the sum of $264.20 as a partial payment of this premium the Court said:

"There was no evidence that the company itself treated the check as a partial payment or otherwise ratified the agent's acts. Indeed, the only permissible inference from the evidence was to the contrary."

The Court of Appeals in support of its holding that the agreement of Cusick that the premiums on the policy should be $34.70 monthly instead of $389.50 annually was an immaterial change, states that under the policy the insured had the option of changing the mode of premium payment from an annual to a monthly basis (R. 140). Even

if the policy had given the insured any such option, nevertheless that policy would have had to become effective before the insured could have claimed the benefit of that option and it is petitioner's insistence that the policy did not become effective until March 20, 1940, when the company itself, at Cusick's request, changed the mode of premium payment from an annual to a monthly basis. Furthermore, neither of the policies which were issued on Chapman's application of February 17, 1940, gave the insured the option or privilege of paying his premiums monthly. In its printed record in the Court of Appeals petitioner did not incorporate therein the clause of the policy which gave the insured the option or privilege of changing the mode of premium payment because it did not consider that that clause of the policy was material to the issues on that appeal and under Rule 10 (a) of the Court of Appeals for the Eighth Circuit only such part of the entire record on appeal shall be printed which is deemed essential to a determination of the issues involved. When, however, the Court of Appeals handed down its opinion, in which it stated that the policy gave the insured the option or privilege of paying the premiums on the policy monthly, petitioner filed a motion (R. 143) in the Court of Appeals to correct the printed record by including therein the clause of the policy giving the insured the option or privilege of changing the mode of premium payment. That motion was denied by the Court of Appeals (R. 144). There has been transmitted by the Clerk of the Court of Appeals to the Clerk of this Court with the record in this cause the original policy of March 17, 1940, marked "Defendant's Exhibit A" in the District Court, which policy was, as is shown by the certificate of the Clerk of the Court of Appeals thereto, lodged by respondent with the Court of Appeals at the oral argument for the use of the Court in the determination of the cause. Under these circumstances we submit that that policy is properly before this Court for

consideration. As shown by the printed record (page 72), the policy of March 17, 1940 (R. p. 48), is the same as the policy of March 4, 1940 (R. p. 72), with the exception of the amount and due date of the premiums and the effective date of the policy. The provision of the policy for a change in the mode of premium payment is as follows (page 6, Par. 5 of Policy):

> "The premium may be made payable annually, semiannually, or quarterly in advance at the company's respective rates for such modes of payment, and, except as may be otherwise provided, the mode of payment may be changed by agreement in writing and not otherwise."

Manifestly, therefore, the statement of the Court of Appeals in its opinion that the policy of March 4, 1940, gave the insured the option of paying his premiums monthly is an erroneous statement.

Furthermore, the effective, and anniversary date of a policy is also a material term of the contract and the agreement of Cusick, even on the assumption that he made such an agreement, that the policy of March 4, 1940 should become effective on March 17, 1940, instead of March 4, 1940, and that March 17, 1940, instead of March 4, 1940, should be the anniversary date of that policy, were material, and not immaterial, changes.

If, therefore, Cusick had no authority under the Illinois law to change or modify the policy of March 4, 1940, so that the premiums thereunder should be payable monthly instead of annually, and that the effective date of that policy should be March 17, 1940, instead of March 4, 1940, then unquestionably there never was any contract of insurance until the petitioner at its home office in New York City on March 20, 1940, rewrote that policy by providing for the payment of premiums thereon monthly instead of annually, and that the effective date of the policy should be March 17, 1940, instead of March 4, 1940. As the first

monthly premium on that policy was paid on March 17, 1940, the policy, under the provisions of the application of February 17, 1940, became effective upon the company's acceptance of the counter proposal or offer of the applicant that the premiums on the policy should be payable monthly instead of annually. Unquestionably, therefore, the policy of March 4, 1940 never became effective and as the policy of March 20, 1940 became effective in New York, that policy was a New York, and not an Illinois contract, as held by the Court of Appeals.

III.

Under the law of Illinois petitioner could not be held to have ratified the unauthorized agreement of its soliciting agent that the premiums on the policy of March 4, 1940 should be payable monthly instead of annually by petitioner's acceptance of the first monthly premium on the policy of March 20, 1940 in the absence of any evidence that petitioner knew of the unauthorized agreement on the part of its agent when it accepted that premium.

There is no evidence whatever that petitioner knew, when it accepted the monthly premium of $34.70 which had been paid to petitioner's soliciting agent Cusick on March 17, 1940 that Cusick had undertaken on its behalf to change the premiums payable under the policy of March 4, 1940 from an annual to a monthly basis. On the contrary, the evidence clearly establishes that that premium was accepted by petitioner in connection with Cusick's request that the policy of March 4, 1940 should be issued on a monthly, instead of on an annual, premium basis. In other words, that premium was tendered to petitioner in connection with a request that petitioner should change the policy of March 4, 1940 from an annual, to a monthly, pre-

mium basis, and not as a payment of the first premium on a policy which had already been changed by petitioner's soliciting agent from an annual, to a monthly, premium basis.

That a principal will not be deemed to have ratified the unauthorized act or agreement of his agent unless he knew of the agent's unauthorized act or agreement at the time of his alleged ratification thereof is not only the law of Illinois, but it is the law generally.

In Morse v. Illinois Power & Light Co., 294 Ill. App. 498, 14 N. E. (2d) 259, 262, the Court held that a principal could not be held to have ratified an unauthorized agreement of his agent to repurchase stock sold on his principal's behalf unless the principal knew of the unauthorized repurchase agreement at the time of his alleged ratification thereof, and said:

> "The acceptance of the money, knowing that Burnett sold the stock, would constitute a ratification of his agency in the sale of the stock, but it would **not be** a **ratification** of the **repurchase** agreement **unless it was shown that it had full knowledge of it.**"

In Erie Ry. Co. v. Johnson (C. C. A. 6), 106 F. (2d) 550, 552, the Court said:

> "There being no evidence whatever that appellant had authorized or ratified the acts of the officers, it was error to submit the case to the jury."

IV.

The law of Illinois cannot be constitutionally applied in the determination of the rights and obligations of the parties under a New York contract.

It has been repeatedly held by this Court that a contract made in State A cannot be constitutionally controlled by the laws of State B.

In Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, a seven-year term policy was applied for and delivered to the insured in Tennessee. That policy gave the insured the option or privilege of converting it during the seven-year period to any other form of policy issued by the company. After the insured had moved to Texas, he elected in that state to convert the policy to another form of policy and the question at issue was whether the converted policy was a Tennessee or a Texas contract. The Texas Supreme Court held that it was a Texas contract and was therefore controlled by the laws of that state. On a writ of error to this Court on the ground that the application of the Texas statutes to what the company claimed was either a Tennessee or a Connecticut contract, deprived it of its property without due process of law in contravention of the Fourteenth Amendment, it was held that the converted policy was a Tennessee and not a Texas contract and that, therefore, the Texas statute could not constitutionally apply to the action on the converted policy. In that connection the Court said (l. c. 393, 399):

> "Other matters aside, the contention that the contract is controlled by the law of Tennessee or Connecticut—in which event the Texas statute in respect of penalty and attorney's fee as construed and applied, is unconstitutional—clearly presents a substantial question under the full faith and credit clause of the Constitution. Royal Arcanum v. Green, 237 U. S. 531, 540, 541. See, also, New York Life Ins. Co. v. Head, 234 U. S. 149, 159-160.
>
> * * * * * * *
>
> "In the light of these decisions, then, we inquire whether the second policy issued to Dunken is to be controlled by Tennessee or Texas law. The contract contained in the original policy was a Tennessee contract. The law of Tennessee entered into it and became a part of it. **The Texas statute was incapable of being constitutionally applied to it** since the effect of

such application would be to regulate business outside of the State of Texas and control contracts made by citizens of other states in disregard of their laws under which penalties and attorney's fees are not recoverable. New York Life Ins. Co. v. Head, 234 U. S. 149; Overby v. Gordon, 177 U. S. 214, 222. The second policy here was issued in pursuance of, and was dependent for its existence and its terms upon, the express provisions of the contract contained in the first one. By those provisions, upon the simple application of the insured, the new policy must issue. Nothing was left to future agreement. The terms of the new policy were fixed when the original policy was made. In effect, it is as though the first policy had provided that upon demand of the insured and payment of the stipulated increase in premiums that policy should, automatically, become a twenty-payment life commercial policy. It was issued, not as the result of any new negotiation or agreement, but in discharge of pre-existing obligations. It merely fulfilled promises then outstanding; and did not arise from new or additional promises. The result in legal contemplation was not a novation, but the consummation of an alternative specifically accorded by, and enforceable in virtue of, the original contract. If the insurance company had refused to issue the second policy upon demand, the insured could have compelled it by a suit in equity for specific performance.

"From these premises it necessarily results that the second policy follows the status of the first for which it was exchanged, and is **not subject** to the **Texas statute** relating to penalties and attorney's fees, but is controlled by **Tennessee law.** The judgment below, therefore, in so far as it **gives effect** to the **Texas statute by imposing** a penalty of twelve per cent and allowing attorney's fees, is erroneous in that the **Texas statute cannot constitutionally** be applied to a **Tennessee contract.**"

In New York Life Ins. Co. v. Head, 234 U. S. 149, the question at issue was whether a policy loan agreement was

a New York or a Missouri contract. The Missouri Supreme Court had held that it was a Missouri contract and was controlled by the Missouri statutes. On a writ of error this Court held that the loan agreement was a New York contract and that, consequently, the application of the Missouri statutes to a New York contract deprived the company of its property without due process of law in contravention of the Fourteenth Amendment.

In Hartford Accident & Indemnity Co. v. Delta & Pine Land Co., 292 U. S. 143, it was held that the application by the Mississippi Supreme Court of a statute of Mississippi to what this Court held was a Tennessee contract deprived the defendant of its property without due process of law. The Court said (l. c. 149):

> "A state may limit or prohibit the making of certain contracts within its own territories (Hooper v. California, 155 U. S. 648; Orient Insurance Co. v. Daggs, 172 U. S. 557, 565-6; New York Life Ins. Co. v. Cravens, 178 U. S. 389, 398-9); but it cannot extend the effect of its laws beyond its borders so as to destroy or impair the right of citizens of other states to make a contract not operative within its jurisdiction and lawful where made. New York Life Insurance Co. v. Head, 234 U. S. 149; Aetna Life Ins. Co. v. Dunken, 266 U. S. 389, 399. Nor may it in an action based upon such a contract enlarge the obligations of the parties to accord with every local statutory policy solely upon the ground that one of the parties is its own citizen. Home Insurance Co. v. Deck, 281 U. S. 397, 407-8. * * *
>
> "A legislative policy which attempts to draw to the state of the forum control over the obligations of contracts elsewhere validly consummated and to convert them for all purposes into contracts of the forum regardless of the relative importance of the interests of the forum as contrasted with those of the place of the contract, conflicts with the guarantees of the Fourteenth Amendment."

While it is true that in the foregoing cases the Court was considering the right to apply the statutory law of State A to a contract made in State B, there can be no distinction between the statutory and the common law in this regard. In other words, if the respondent could not have recovered under the policy of March 17, 1940, if it was controlled by the New York law, and the Court of Appeals concedes that there could have been no recovery under the policy under the New York law, then the petitioner is just as much prejudiced by the application of the common law of Illinois, under which the Court of Appeals holds that respondent was entitled to recover on the policy, as it would have been by the application of the statutory law of Illinois.

There can likewise be no question, under the foregoing decisions, that where, as here, a petitioner claims that he has been deprived of his property without due process of law by the application of the laws of one state in the determination of his obligations under a contract which he asserts was made in another state, this Court must determine for itself where the contract was made in order for it to determine the applicatory law and whether petitioner has, as claimed, been deprived of his property in contravention of the Fourteenth Amendment by the application of the law of State A to a contract which is claimed to have been made in State B.

Respectfully submitted,

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No 914

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1942.

NEW YORK LIFE INSURANCE COMPANY, a Corporation,
Petitioner,
vs.
MAE G. CHAPMAN,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

ADDITIONAL STATEMENT OF THE MATTER INVOLVED.

We believe that petitioner's summary statement of the matter involved might be slightly enlarged upon in order to give this Court a more complete factual background. The following additional facts are important for this purpose:

The evidence is uncontradicted that prior to petitioner's agent, William Cusick, coming to Belleville, Illinois, to deliver the policy to the insured on March 17, 1940, he

spoke to the respondent, Mrs. Chapman, over the telephone on the preceding Wednesday and was then advised by the respondent that the insured, Abel W. Chapman, at that time was sick in bed. The respondent further advised Mr. Cusick that the insured had consulted a doctor. On March 17, 1940, when Cusick came to Belleville, Illinois, to deliver the policy he was at that time advised by the insured himself that he had been sick and that he had consulted a doctor. The insured further advised Mr. Cusick that he had to return to see the doctor the following day, which was Monday, March 18, 1940 (R. pp. 105-107).

It was not until he went to see Dr. Walton the evening of the following day, March 18, 1940, that he learned he was suffering from a duodenal ulcer (R. pp. 88, 89).

The death of the insured, which occurred in August, 1940, resulted from "organic heart disease, coronary sclerosis" and not from the duodenal ulcer (R. pp. 50, 51).

Petitioner's summary statement also fails to point out that the insured at the first conference with petitioner's agent, Cusick, in February, 1940, discussed the monthly method of paying the policy premiums (R. pp. 104, 121-122); that subsequently a resume of all the insured's life insurance prepared by the agent, Cusick (Respondent's Exhibit D, R. pp. 113-115), showed the insurance policy in question payable on a monthly basis. Likewise the receipt given the insured for his policy by Cusick on March 17, 1940 (Respondent's Exhibit C, R. p. 111), on the reverse side thereof showed the various methods of payment, including the monthly method. The record further shows that when the policy was delivered to the insured and accepted by him on March 17, 1940, he noted that the policy was issued on an annual basis and he at this time requested that the method be changed to a monthly basis (R. p. 106). This was agreed to and Chapman then paid Cusick the first monthly premium of $34.70.

The petitioner's agent, Cusick, thereupon took back the policy that he had previously delivered to the insured and gave him a receipt for the policy (Respondent's Exhibit C), which receipt reads as follows:

"March 17, 1940

Received of A. W. Chapman, policy #17558729, in order to change to monthly rate basis and redate policy as of today.

(Signed) Wm. J. Cusick, Agent
New York Life Ins. Co."

(R. p. 111.)

The monthly premium upon the policy in question was the sum of $34.70. The insured paid this monthly premium not only for March, 1940, but subsequently as they came due also for the months of April, May and June, 1940 (R. p. 49). The insured's death occurred within the grace period allowed for the payment of the July, 1940, premium.

REASONS RELIED ON FOR DISALLOWANCE OF WRIT.

I.

In Applying the Conflict of Law Rule and in Deciding That the Contract in Question Was an Illinois Contract, the Court of Appeals Did Not Decide the Question in Conflict With the Holding of the Courts of Illinois Because:

A.

When petitioner authorized its agent, Cusick, to enter the State of Illinois in its behalf, petitioner thereby became bound to accept such consequences as Illinois by Its Laws Might Attach to Any of the Acts of Its Agent, Authorized or Unauthorized.

American Law Institute's Restatement of Conflict of Laws, p. 423, Sec. 345;
2 Beale on Conflict of Laws, p. 1193;
Grant v. North American Benefit Corp., 223 Mo. App. 104, 8 S. W. (2d) 1043.

B.

In Illinois an agent in delivering a policy may, without affecting the validity of the contract, waive the method of payment provided in said policy. The petitioner, by accepting the premium which its agent, Cusick, collected in Illinois on the 17th day of March, 1940, is thereby deemed to have waived and is estopped from asserting certain restrictive provisions of the application and policy.

Mulligan v. Metropolitan Life Ins. Co., 149 Ill. App. 516;
John Hancock Mutual Life Ins. Co. v. Schlenk, 175 Ill. 284, 51 N. E. 795;
Penn Mutual Life Ins. Co. v. Keach, 32 Ill. App. 427 (affirmed 134 Ill. 583, 26 N. E. 106).

C.

Petitioner's own evidence shows that on March 20, 1940, it subsequently ratified in New York the change in the method of paying premiums and the redating of the policy. Where an agent acts beyond or contrary to his instructions, and his acts are subsequently ratified by his principal, the place of contracting is where the agent acted.

American Law Institute's Restatement of Conflict of Laws, pp. 407-8, Sec. 331;
Golson v. Ebert, 52 Mo. 260.

II.

The Court of Appeals Has Not Decided the Question Involved in Conflict With the Decisions of the Courts of the State of Illinois Because, Under the Law of Illinois, the Knowledge of the Agent Cusick Is the Knowledge of the Petitioner, and Hence When Cusick Was Advised on March 17, 1940, That Chapman Had Consulted a Physician Subsequent to the Date of the Application and Cusick Then Delivered the Policy, and the Petitioner Through Cusick Accepted the First Premiums, and the Petitioner Accepted Subsequent Premiums, the Petitioner Is Deemed to Have Waived and Is Estopped From Asserting the Restrictive Provisions of the Application and Policy to the Effect That Knowledge of the Agent Is Not Knowledge of the Company, and That the Agent Cannot Deliver a Policy to the Insured in the Event the Insured Had Consulted a Physician Since the Date He Signed the Application.

Germania Life Ins. Co. v. Koehler, 168 Ill. 293, 48 N. E. 297;
Benatti v. John Hancock Mutual Life Ins. Co., 290 Ill. App. 438, 8 N. E. (2d) 551;

Hungate v. New York Life Ins. Co., 267 Ill. App. 257 (certiorari denied by Ill. Supreme Ct.);
Beddow v. Hicks, 303 Ill. App. 247, 25 N. E. (2d) 93;
Northwestern Mutual Life Ins. Co. v. Amerman, 16 Ill. App. 500;
Metropolitan Life Ins. Co. v. Sullivan, 112 Ill. App. 500;
Guter v. Security Benefit Assoc., 335 Ill. 175, 166 N. E. 521;
Niemann v. Security Benefit Assoc., 350 Ill. 308, 183 N. E. 223;
Mousette v. Monarch Life Ins. Co., 309 Ill. App. 224, 32 N. E. (2d) 1004;
Globe Mutual Life Ins. Co. v. Ahern, 92 Ill. App. 326 (affirmed 191 Ill. 167, 60 N. E. 806);
Teutonia Life Ins. Co. v. Beck, 74 Ill. 165;
Micezey v. Mo. State Life Ins. Co., 273 Ill. App. 281.

Under the law of Illinois, it was the duty of petitioner's agent, Cusick, to ascertain the condition of the health of Chapman before he delivered the policy in the State of Illinois on the 17th day of March, 1940, and, as he delivered the policy with full knowledge that Chapman had consulted a physician since the date of application, petitioner is bound thereby.

Hungate v. New York Life Ins. Co., 267 Ill. App. 257;
Micezey v. Mo. State Life Ins. Co., 273 Ill. App. 281;
Beddow v. Hicks, 303 Ill. App. 247, 25 N. E. (2d) 93.

ARGUMENT.

I.

In Applying the Conflict of Law Rule and in Deciding That the Contract in Question Was an Illinois Contract, the Court of Appeals Did Not Decide the Question in Conflict With the Holding of the Courts of Illinois Because:

A.

When petitioner authorized its agent, Cusick, to enter the State of Illinois in its behalf, petitioner thereby became bound to accept such consequences as Illinois by its laws might attach to any of the acts of its agent, authorized or unauthorized.

Petitioner of course must understand that the purpose of the writ here sought is not to grant it an appeal from the ruling of the Court of Appeals and therefore have this Court redetermine the facts and inferences to be deduced therefrom. The issuance of the writ is directed to the sound judicial discretion of this Court and the exercise of this discretion is limited to the purposes set out in the Court's rule (Rule 38). The only possible ground on which this application can rest is that an important question of local law has been decided in conflict with local decisions. It is through this narrow portal that petitioner must seek admission to the bar of this Court.

A reading of the opinion of the Court of Appeals in our judgment demonstrates that that court based its conclusions in absolute and positive conformity with the decisions of Illinois.

Petitioner and respondent are in agreement that the Court of Appeals correctly determined that the conflict of law rule of Missouri must be used in determining by what state law the insurance contract in question should

be measured. Likewise, it is agreed that the Missouri rule is that the law of that state where the "last act" necessary to constitute a binding contract took place is the law that governs the case.

Under the facts this last act was found by the Court of Appeals to have taken place in the State of Illinois and hence the law of that state governs. For the most part petitioner's supporting brief and argument is devoted to a reiteration and rediscussion of its views as to the way in which it contends the facts should be interpreted and the inferences drawn. Let us pursue this matter.

Petitioner knew that Chapman lived in Belleville, Illinois, and petitioner gave this policy to Cusick for the purpose of delivering it in turn to Chapman in Belleville, Illinois. There can be no question, therefore, that when Cusick went to Belleville to deliver the policy he was entering a state, a legal arena, that was both contemplated and authorized by his principal, the petitioner.

The uncontradicted evidence shows unequivocally that William Cusick, the agent of the New York Life Insurance Company, delivered the $10,000 policy to Chapman in Belleville, Illinois, the legal arena authorized by petitioner, on March 17, 1940 (R. 105-106). Without contradiction, the evidence further shows that at the time and place the agent Cusick and Chapman agreed the premiums on the policy could be paid monthly, as had previously been discussed, instead of annually, and the first monthly premium was then and there paid by Chapman to the agent Cusick (R. 106); in other words, there was merely a change in the method of paying for what had already been purchased. The policy was then given back by Chapman to the agent Cusick so it could be made to reflect what had been agreed to with respect to the method of paying premiums and also so that it would reflect on its face the effective date, to wit, March 17, 1940 (R. 106-107). The fact of delivery, which is evidenced by a

written receipt, and the payment of the premium at that time, all point to an agreement then and there entered into.

The delivery of this policy and the payment of the premium, we insist, was the last act necessary for the completion of the contract. It was immaterial whether the premiums were to be paid twelve months in advance or one month in advance. In the instant matter the company offered a variety of ways of payment, which variety of ways was intended for the convenience and the use of the assured. There can be no argument about this. In this connection attention is directed to the initial conference between Chapman and the agent, Cusick (R. pp. 104, 121-122), and likewise to Respondent's Exhibit D (R. pp. 113-115). It therefore becomes apparent that it is folly to argue that when Cusick agreed to accept a check from Chapman for the first monthly premium rather than for the first annual premium he was **making** a material or unusual change in the provisions of the contract. Consequently, the Court of Appeals was entirely correct when it concluded that the change in the method of payment was immaterial.

Petitioner argues that there was no final agreement reached in Illinois, that Chapman was in reality making a counter proposal which the agent must in turn submit to the New York office of petitioner for approval or rejection. The answer to this contention is that both the trial court and the Court of Appeals refused to draw this inference from the facts. As this Court well knows, it is not within the realm of certiorari to review this matter in order for this Court to substitute its inferences for those which the trial court sitting as a jury drew from the facts and which the Court of Appeals approved. Petitioner also argues that, if Cusick did make such a final agreement in Belleville, Illinois, he did so without authority, and therefore no contract was made in Illinois. To this argument there are two decisive answers.

Our first reply is that under the law of Illinois, as we will hereinafter clearly demonstrate, petitioner is deemed to have waived and is estopped from asserting any provisions restricting its agents' authority in the premises. We say that when the petitioner authorized its agent to enter in its behalf the legal arena known as Illinois, petitioner thereby became bound to accept such consequences as Illinois by its laws might attach to any of the acts, authorized or unauthorized, of its agent with respect to third parties. This is a fundamental and well-established doctrine of conflict of laws, as the Court of Appeals found.

Section 345, p. 423, of the American Law Institute's Restatement of Conflict of Laws, provides as follows:

> "**Law Governing Effect of Act of Agent or Partner.**
>
> "**The law of the state in which an agent or a partner is authorized or apparently authorized to act for the principal or other partners determines whether an act done on account of the principal or other partners imposes a contractual duty upon the principal or other partners.** (Emphasis ours.)
>
> "Comment:
>
> "(a) **When particular act unauthorized.** The rule stated in this Section is applicable whether the particular act in question of the agent or partner is within the scope of the partnership agreement or the authority of the agent, or whether it is outside such authority. . . . But whether or not a particular act of the agent or partner is authorized, the law of the state where the act is done determines whether the principal is bound by a contract with the third person. . . .
>
> "(c) . . . If, however, the principal or partner sends the agent or other partner into a state to act on his behalf, he assumes the risk of liability not only for authorized but for unauthorized conduct of the agent or partner in accordance with the law of that state.

"Illustrations:

"3. A in State X appoints B as a general agent to conduct business in State Y. A forbids B to borrow money in excess of $10,000 for the operation of the business. B borrows $20,000 on the credit of his principal in State Y. By the law of State X, A's limitation upon B's power to borrow is effective. By the law of State Y, A is bound for the full amount of the loan. A is liable on the loan."

In 2 Beale, "The Conflict of Laws," page 1193, the writer says:

"Although the law of the place where a partnership is created or an agent is appointed determines the obligations resulting as between the parties to that contract, the law of the place where the act is done determines the effect on rights and duties or of the principal or of other partners of an act of an agent or partner in carrying out a contract of agency or partnership."

Missouri is in line with the rule laid down by the American Law Institute's Restatement to the effect that the agent's authority must be measured by the law of the state where the agent performs its act. In **Grant v. North American Benefit Corp.**, 8 S. W. (2d) 1043 (Mo. App.), defendant claimed the insurance policy was an Illinois contract, while plaintiff contended it was a Missouri contract. Section 6320, R. S. Mo. 1919, provided that whoever receipted for money in Missouri on account of insurance for an insurance company not authorized to do business in Missouri shall be deemed to be an agent of said company. Defendant sought to introduce testimony that, although one Hansberger had taken the application, given a receipt, and delivered the policy in suit in Missouri, he was not in fact defendant's agent. The Missouri Court of Appeals held that this testimony was properly excluded because the above-mentioned Missouri statutes governed the

case and by virtue thereof Hansberger became defendant's authorized agent.

And so in the matter at bar the Court of Appeals looked to the law of the State of Illinois where William Cusick delivered the policy to Abel W. Chapman and where these two men agreed that the premiums could be payable monthly and the policy redated in order to ascertain whether William Cusick had authority to bind the petitioner and also in order to ascertain what legal consequences attached to his acts.

B.

In Illinois an agent in delivering a policy may, without affecting the validity of the contract, waive the method of payment provided in said policy. The petitioner by accepting the premium which its agent Cusick collected in Illinois on the 17th day of March, 1940, is thereby deemed to have waived, and is estopped from asserting certain restrictive provisions of the application and policy.

As the Court of Appeals found, the law of Illinois on the foregoing subject is quite clear and definite. It is the law of Illinois that an agent in delivering a policy may, without affecting the validity of the contract, waive the method of payment provided in said policy contract and accept a different method or amount of payment, regardless of instructions that he may have from his principal to the contrary, and regardless of the fact the application and the policy actually issued pursuant thereto may expressly provide that the agent has no authority to waive the provisions thereof with respect to the method of the payment of premiums on said policy. **The insurance company, by accepting the premiums which the agent actually collects, shall thereby be deemed to have waived, and is estopped from asserting,** the restrictive provisions in the policy and application of insurance.

In **Mulligan v. Metropolitan Life Insurance Company,** 149 Ill. App. 516, the following are the facts: The **application and the policy** in question provided that the policy should not become effective until it was delivered and the premium called for by the policy was paid. The $500.00 policy was applied for by the insured and in his application he asked that the premiums be payable semiannually. The agent delivered the policy to him, at which time the insured requested that he be permitted to pay the first semiannual premium in weekly installments rather than pay said premium in a lump sum. The agent accepted on this basis a weekly installment of the semiannual premium. Before that first week expired the insured died and the insurance company contended that it was not liable on the policy for the reason that the provisions of **the application and the policy** had not been complied with by the payment in full on the part of the insured of the first premium called for by the policy. In rejecting this contention and in affirming a judgment for the plaintiff, the Court said (l. c. 518-519):

> "If Cole (the insurance agent) agreed that the premium might be paid in weekly installments, the condition of the policy requiring actual payment and acceptance of the full semiannual premium before the same would become effective was thereby waived. (Citing authorities.)" (Parenthesis ours.)

See, also, to the same effect:

> **John Hancock Mutual Life Ins. Co. v. Schlenk,** 175 Ill. 284.
>
> (In this case where **the application and policy** contained similar provisions the agent accepted part of the first premium in cash and extended credit for the balance.)

Penn Mutual Life Ins. Co. v. Keach, 32 Ill. App. 427 (affirmed 134 Ill. 583).

(**The application and policy** provided that the agent had no power to waive or modify any of the provisions of the application or the policy. The agent accepted a note for the premium and it was held that the insurance company was liable on the policy.)

Therefore, not only was the change in the method of payment of the premium immaterial, as the trial court and this Court of Appeals found, but also under the law of Illinois (supra) it was directly permissible, especially when it was later ratified by petitioner, which we will next discuss.

C.

Petitioner's own evidence shows that on March 20, 1940, it subsequently ratified in New York the change in the method of paying premiums and the redating of the policy. Where an agent acts beyond or contrary to his instructions and his acts are subsequently ratified by his principal, the place of contracting is where the agent acted.

Our second reply to petitioner's argument that Cusick had no authority to make a final agreement in Illinois to change the method of paying the premiums, and to redate the policy, is that petitioner's own evidence shows that on March 20, 1940, it subsequently ratified and approved this agreement in New York. It is the well-established rule of conflict that if any agent acting beyond or contrary to his instructions makes a contract for his principal and his contract is subsequently ratified by the principal, **the place of contracting is where the agent acted.** The authorities on this proposition are equally decisive against petitioner.

Section 331, pp. 407-408, of the American Law Institute's Restatement of the Conflict of Laws, provides:

> **"Contract Made Through Unauthorized Agent.**
>
> "(1) **If an agent acting beyond or contrary to his instructions, or one who purports to be an agent, makes or accepts a promise for the principal and his act is ratified by the principal, the place of contracting is where the agent acted.** . . .
>
> "Illustrations:
>
> "1. A in State X sends B to the M bank in State Y to borrow $1,000 for him. The M bank refuses to make the loan. B learning that the N bank in Y has money to lend, borrows $2,000 for A from the N bank and notified A. A in X ratified B's act. The contract of loan is made in Y. . . ."

In 2 **Beale, "The Conflict of Laws,"** page 1076, the learned writer says:

> "Ratification is a substitute for original authority and is not a contract, and the time and place of the ratified contract relate back to the time when the agent acted.
>
> "This is not only a logical but a necessary conclusion from the doctrines of relation back and ratification, whose purpose it is to give to the parties the rights and duties expected when the contract was originally entered into with the agent. **By the same fiction of relation back the place of contracting is held to be the place where the agent's agreement was made."** (Emphasis ours.)

Missouri follows the rule laid down by the restatement and the other authorities. **Golson v. Ebert**, 52 Mo. 260.

To summarize at this point, the record in this case shows without contradiction that on March 17, 1940, William Cusick, the agent of petitioner, delivered the policy to

Abel W. Chapman in Belleville, Illinois, and that these gentlemen then and there agreed the premiums on the policy would be payable monthly and that the policy was to be effective from that day (R. 106). Such facts make mandatory the invocation of the law of Illinois either because petitioner by authorizing its agent to transact business in Illinois agreed to accept the consequences that law attached to the acts of the agent (**Mulligan v. Metropolitan Life Ins. Co.**, supra), or because petitioner subsequently ratified the agreement its agent made, and such ratification relates back to the time when, and place where, the agent acted, namely, Belleville, Illinois.

Further, the method of payment, whether on an annual or a monthly basis, was one of the optional privileges extended by the petitioner, and consequently the election of one over the other was entirely immaterial, even though one of the methods may have been mentioned in the contract. By no process of rational reasoning can the circumstances with respect to the acceptance of a monthly instead of an annual premium be dignified into the "making" of a contract, and this particularly when without contradiction the evidence conclusively shows that the monthly method of payment had been in contemplation of the parties and was the subject of discussion from the first moment that Chapman sat down at the desk of the agent Cusick. Neither can the change of the effective date of the policy be dignified as the "making" of a contract. A month had elapsed and it is common knowledge that in instances where there is **a much lesser lapse of time** contracts are redated because there is no object in an assured paying an insurance company for a policy before the policy is effective. We repeat, the Court of Appeals correctly applied the conflict rules and the law of Illinois. The law of Illinois governs. The contract is an Illinois contract.

II.

The Court of Appeals Has Not Decided the Question Involved in Conflict With the Decisions of the Courts of the State of Illinois Because Under the Law of Illinois the Knowledge of the Agent Cusick Is the Knowledge of the Petitioner, and Hence When Cusick Was Advised on March 17, 1940, That Chapman Had Consulted a Physician Subsequent to the Date of the Application and Cusick Then Delivered the Policy, and the Petitioner Through Cusick Accepted the First Premium, and the Petitioner Accepted Subsequent Premiums, the Petitioner Is Deemed to Have Waived and Is Estopped From Asserting the Restrictive Provisions of the Application and Policy to the Effect That Knowledge of the Agent Is Not Knowledge of the Company, and That the Agent Cannot Deliver a Policy to the Insured in the Event the Insured Had Consulted a Physician Since the Date He Signed the Application.

The following discussion of the facts and the law of Illinois applicable thereto conclusively, in our opinion, demonstrates that the finding and opinion of the Court of Appeals certainly did not conflict with the law of Illinois.

The uncontradicted evidence, and we may fairly say the admitted fact, in this case is that William Cusick, the agent of the New York Life Insurance Company, had full and complete knowledge when he delivered the policy in the City of Belleville, Illinois, on March 17, 1940, that the assured, Chapman, had, subsequent to the date of the application, to wit, February 17, 1940, consulted with and had been treated by a physician (R. 105-106). **The Court of Appeals commented on the fact that Cusick did not take the stand to deny the foregoing facts.** Therefore, under the law of Illinois, we say that the knowledge possessed by Cusick became and was the knowledge of the

company, and that, consequently, when the company, through its agent, Cusick, accepted the first premium and the subsequent premiums, **the company is deemed to have waived and is estopped from asserting the provisions of the application and the policy to the effect that knowledge of the agent is not knowledge of the company, that the agent cannot waive or modify the application or the policy, and also to the effect that the agent cannot deliver the policy to the insured in the event the insured has consulted a physician since the date he signed the application.**

Germania Life Insurance Company v. Koehler, 48 N. E. 297, 168 Ill. 293 (Illinois Supreme Court), is the leading case which represents the public policy and law of Illinois and which has never been challenged, but which, on the contrary, has been supported by a long and unbroken line of decisions.

In the Germania case we find that the assured had been issued a policy by the insurance company, which contained specific restrictions that the policy would be void and all premiums paid thereon forfeited to the company if the assured should ever go to visit certain sections of the United States south of a certain designated line during certain periods of the year. These restrictions were particularly specific. The policy also contained the proviso to the effect that agents had no authority to make, alter or discharge contracts or waive forfeitures.

It developed that the assured did visit the prohibited area, to wit, the State of Texas, and that while he was so visiting he paid three premiums to the agent, which agent was told and knew where the assured was at the time he accepted the payments.

At l. c. 298, 48 N. E., the position of the company is stated, to the effect that the agent had a limited authority, that this appeared in the policy and also on the premium receipts, and hence the assured was advised of such

limited power and therefore that knowledge of the agent was not the knowledge of the company so as to act as a waiver of the specific limitations. At l. c. 298-299 the Court says:

> "We are unable to agree with the contention thus made on behalf of the appellant."

At l. c. 299, 48 N. E., the Court continues:

> "The testimony shows that this agent had authority to receive applications for insurance, deliver policies, receive premiums, and countersign receipts for premiums paid to the company. It is claimed that, because his authority was limited to the receipt of premiums, it did not include the right to alter or change the contract, or waive a forfeiture or breach of condition. **The appellee does not insist, and the instructions do not assert, that the waiver of the breach of the condition, which forbade the insured to reside in Texas within the specified months, was made by the agent at Belleville, but that it was made by the company itself. The evidence shows clearly that the agent at Belleville had notice that the insured was residing in Texas.**" (Emphasis ours.)

The foregoing excerpt shows that the agent's authority in the Germania case is precisely identical with that of the agent, Cusick, in the matter at bar.

In the matter at bar the agent likewise had notice that the insured Chapman had consulted a physician since February 17, 1940. In the Germania case, by a certain act the insured was to lose something, and in the instant case, by a certain act, the insured was also to lose something. In the Germania case the insured was advised of this restriction when he received the policy. In the instant case Chapman was "**supposedly**" advised of the restrictions when he signed the application (but which he never had in his pos-

session; Norgren's testimony, R. 74), and also later when he received the policy. There is no difference in principle.

The Court continues:

> "**This notice to its agent was notice to the company of the fact of such residence.** It is true that the rule which imputes to the principal the knowledge possessed by the agent applies only to cases where the knowledge is possessed by an agent within the scope of whose authority the subject matter lies. In other words, notice to an agent which is held to be notice to the principal must be notice of such facts as are connected with the business in which the agent is employed. Bank v. Schott, 135 Ill. 655, 26 N. E. 640. Here, when Vanderschmidt received notice of the residence of the insured in Texas, he received notice of a fact which was connected with his business. * * * **By receiving the premium in New York, and by forwarding a written receipt therefor, after notice to its agent that there was a breach of the condition, the company itself was chargeable with a waiver of the condition.** It is not necessary to hold that the waiver was that of the agent in Illinois, but, in view of the facts stated, it was a waiver by the company itself. * * *" (Emphasis ours.)

We respectfully submit that the above case represents a well-reasoned conclusion which is sound and equitable, as the Court of Appeals found.

The essential and determinative fact is, as we contend, and the Court of Appeals found, that restrictive provisions for the benefit of a party, whether they be precedent or subsequent, may be waived if knowledge of their breach is possessed by an agent of the party. Illinois holds to this principle. Knowledge of the agent is knowledge of the principle. In the Germania case the insurance company sought to advise the insured of the restrictions by statements in the policy which the insured had. In the instant

case advice was sought to be given in the application which the insured **never had** (R. 74), and also in the policy. In the Germania case the alleged breach of condition relied upon to seek avoidance of the policy occurred after delivery to the insured of the policy containing the restrictive provisions. In the matter at bar the alleged breach of condition whereby petitioner seeks to avoid the policy occurred after Chapman signed the application containing the restrictive provisions. Thus, the time element and the opportunity afforded the insured in both cases to learn of the agent's restricted power of waiver and to impute knowledge is the same in principle in both cases. The fact is that in the Germania case the insured had more opportunity to learn of the restriction, because the policy was in his possession for some time prior to the breach. In the matter at bar Chapman did not have possession of either the application or the policy prior to the breach. Thus, the Germania case is a fortiori authority for our position, as the Court of Appeals quite properly found.

It is not the method of advice that is of importance; it is rather the knowledge of a fact upon which the principal can act if he so desires. If the principal or his agent has that knowledge and no action is taken thereupon, then, of course, it is sound public policy and also fair dealing and common sense to say the restriction is waived and the principal is bound.

The Germania case and the unbroken line of decisions which have followed it have clearly enunciated the law and public policy of the State of Illinois. In the Germania case the insured had knowledge of the agent's restricted authority in advance of the breach of the condition subsequent. In the matter at bar the petitioner argues that the insured had knowledge of the agent's restricted authority in advance of the alleged breach of the condition precedent. In the Germania case advance knowledge did not defeat liability upon the policy, and in the matter at bar,

under the law of Illinois, the **alleged** advance knowledge of the insured cannot defeat liability upon the policy.

It is entirely appropriate at this point to inquire if notice to the agent is not notice to the company, what was the insured to do in the situation at bar? How was the matter to be determined? **The application and the policy are silent.** To whom was he to report the fact? Was he to write a letter to the president of the New York Life Insurance Company? Or was he to go to New York and personally wait upon the president of the company? **Or,** would he tell the agent of the company who took his application, who had him examined, with whom he had all his contacts and who the petitioner sent to Belleville, Illinois, to deliver the policy and who was empowered to take the insured's money for the premium? We say that, before the petitioner is entitled to avoid the solemn obligation, which a life insurance contract should be, by asserting that knowledge to its agent is not its knowledge, the petitioner should be required to defintely advise an insured of some reasonable step which the insured might take to convey this information to those persons the company recognizes as qualified to accept such knowledge. This is the clear public policy of Illinois, as the Court of Appeals found.

We have cited a number of Illinois cases (Point II) which, although they are in point, we do not believe it necessary to individually discuss and burden the Court with. We do feel that of those cases the following are pertinent and illustrative of all and fully substantiate our contention that the Court of Appeals in its opinion did not decide in conflict therewith:

Benatti v. John Hancock Mutual Life Ins. Co., 8 N. E. (2d) 551, 290 Ill. App. 438;

Hungate v. New York Life Ins. Co., 267 Ill. App. 257 (Certiorari denied by Illinois Supreme Court);

Northwestern Mutual Life Ins. Co. v. Amerman, 16 Ill. App. 528;

Metropolitan Life Ins. Co. v. Sullivan, 112 Ill. App. 500;
Guter v. Security Benefit Assoc., 335 Ill. 174;
Niemann v. Security Benefit Assoc., 350 Ill. 308.

Petitioner has attempted to distinguish the foregoing Illinois authorities and contends inter alia that the cases cited involve "general agents," while Cusick is only a "soliciting agent," upon whose conduct waiver and estoppel should not be invoked against the company. It is true that some of the cases cited by respondent are cases involving real "general agents." The fact is, however, that the courts in Illinois have used the term "general agent" in a different sense than is understood by counsel for petitioner. In Illinois an insurance agent who has authority to take applications for insurance, collect premiums therefor, mail such applications to his company, receive back the policies from the company and deliver them to the insured, is termed a "general agent."

In **Mousette v. Monarch Life Ins. Co.,** 32 N. E. (2d) 1004, 309 Ill. App. 224 (Ill. App. 1941), the insured applied for a policy of life insurance. At 32 N. E. (2d), l. c. 1005, the Court, in stating the facts, said:

> "The evidence further disclosed that on February 24, 1937, H. H. Hoffman, an agent of defendant, operating out of its East St. Louis office, employed by the defendant to take applications for insurance, collect premiums therefor, mail such applications to the defendant and receive and deliver the policies issued pursuant thereto, took Tony's application for the policy of insurance here involved."

(Cusick's authority as agent of petitioner precisely measures up to this authority.)

Subsequently, in the Mousette case, the agent called on the insured, delivered the policy and collected the first

premium, just as was done in the matter at bar. At that time the arm of the insured was bandaged as a result of an automobile accident in which he had been injured a few days before. The agent saw this and the insured told him about it and also stated he had been to a hospital and was being treated by a physician. This is certainly comparable to the case at bar. The policy provided that it should not become effective unless delivered during the "lifetime and sound health of the applicant." Several days later the insured died. In affirming a judgment for the beneficiary on said policy the Court held (l. c. 1007):

> "An examination of the evidence in this case persuades us that the defendant's agent, Hoffman, had authority to take applications for insurance, and to take this application in question; and that he had authority to and did cause the application in question to be delivered to the defendant herein; and that he did have a right to and did receive and deliver the policy issued pursuant to such application; and that he collected the premium therefor; and that he was a general agent of the defendant herein and his knowledge of the injury in question was the knowledge of the defendant company. Hancock Life Ins. Co. v. Schlenk, 175 Ill. 284, 51 N. E. 795; Niemann v. Security Benefit Ass'n, 350 Ill. 308, 183 N. E. 223."

From the statement of facts it is clear that the Court in calling Hoffman a "general agent" was using terminology, in a broad sense, and that if Hoffman in fact was a general agent then so was Cusick in the matter at bar.

In **Metropolitan Life Insurance Company v. Sullivan**, 112 Ill. App. 500, a policy of insurance was issued that provided the company was to be released from all liability of the insured within two years from the date the policy was issued became engaged in the manufacture or sale of liquor. The policy also provided that only the president, vice-president, secretary or actuary could vary

or modify the policy, or waive any forfeiture. Within the two-year period the insured entered the saloon business. Two different agents collected premiums on said policy with actual knowledge of the insured's occupation. The Court held, in affirming a judgment of recovery on the policy, that the provision in the policy about waiver had reference only to **express** agreements to waive a forfeiture and not to a waiver claimed to exist by reason of acts of the insurer inconsistent with an intention on its part to enforce the condition. Anent the nature of the agent, the Court further held (l. c. 503):

> "Appellant further insists that notice to its agents, Hanifan and McCarthy, was not notice to it, and that it is therefore not bound by their acts. The proofs in the case showed that they were clothed by appellant with power to solicit and sell insurance, deliver policies and collect premiums. They were therefore general agents, and as such had power to waive conditions of the policy (John Hancock Mut. Life Ins. Co. v. Schlenk, 175 Ill. 284); and notice to them was notice to the company * * *."

The authority of the agents, Hanifan and McCarthy, on the one hand and Cusick on the other is the same. Cusick, like Hanifan and McCarthy, had authority to solicit and sell insurance and deliver policies. While apparently Hanifan and McCarthy had authority to collect all premiums as they came due, Cusick in the instant case was concerned merely with the collection of the first premium. This difference, however, is immaterial for the reason that with respect to the collection of this first premium Cusick had the same authority, rights and duties as Hanifan and McCarthy did with respect to any subsequent premiums they might collect. Further, in so far as the first premium is concerned, there is no logical reason for distinguishing between Cusick on the one hand and Hanifan and Mc-

Carthy on the other as a conduit through which notice of material facts could be conveyed to the company.

Petitioner in its brief contends that **Germania Life Ins. Co. v. Koehler,** 48 N. E. 297, 168 Ill. 293, is distinguishable because it involves a "general agent." The authority of the agent in that case is clearly set forth in that portion of the Court's opinion quoted supra. The agent in that case, and Cusick in the case at bar, had the same authority as did the agents in the Mousette and Sullivan cases, supra. Thus, when the Illinois courts in these cases use the term "general agent" they are including William Cusick.

Some other Illinois cases where notice to one not a general agent was held notice to the company, and where it was recognized that waiver or estoppel could be predicated against the company on such notice are:

Globe Mutual Life Ins. Ass'n v. Ahern, 92 Ill. App. 326, affirmed 191 Ill. 167;
Teutonia Life Ins. Co. v. Beck, 74 Ill. 165;
Guter v. Security Benefit Ass'n, 335 Ill. 174, 166 N. E. 521;
Micezey v. Mo. State Life Ins. Co., 273 Ill. App. 281.

We therefore assert, in view of the applicable law of Illinois which we have hereinbefore discussed, that the petitioner, not the agent Cusick, is deemed to have waived and is estopped from asserting the restrictive provisions of the application and policy to the effect that knowledge of the agent is not knowledge of the company and that the agent cannot deliver a policy to the insured in the event the insured had consulted a physician since the date he signed the application. This was the conclusion of the Court of Appeals and is not in conflict with the law of Illinois—it follows that law.

As a matter of fact, under the law of Illinois, we state the proposition that Cusick owed an affirmative duty of

inquiry under the circumstances existing as to the condition of Chapman's health. This the Court of Appeals found. Let us address ourselves to this point.

Under the Law of Illinois It Was the Duty of Petitioner's Agent Cusick to Ascertain the Condition of the Health of Chapman Before He Delivered the Policy in the State of Illinois on the 17th Day of March, 1940, and as He Delivered the Policy With Full Knowledge That Chapman Had Consulted a Physician Since the Date of Application, Petitioner Is Bound Thereby.

That the agent Cusick owed his principal, the petitioner, an affirmative duty in the case at bar with respect to a possible violation of a condition precedent, just as the agent in the Germania case owed his principal an affirmative duty with respect to a possible violation of a condition subsequent, is made clear by the decision of **Hungate v. New York Life Insurance Company**, 267 Ill. App. 257, certiorari denied by Supreme Court of Illinois, 267 Ill. App. XXXII (1932). In that case the insured signed an application with the present petitioner, New York Life Insurance Company, for a policy of insurance. The application was taken by an agent like Mr. Cusick **and contained the identical provision with respect to treatment by a physician between the date of signing the application and the date of delivery of the policy, which also was the date the policy became a binding obligation because no premium payment accompanied the application.** The date of the application was July 31, 1940. On August 12 the insured consulted a physician, who found a well-developed tumor that later turned out to be an ovarian cancer, which caused the insured's death. On August 13 the agent for the New York Life delivered the policy and collected the first premium. The agent did not ask nor was he informed about the intervening examination by the physician. Further,

there was no evidence that the insured knew at the time the policy was delivered to her that she had cancer, or that the policy and application contained the restrictive provisions. In reversing a judgment for the insurance company and holding the present New York Life Insurance Company liable on said policy, the Court held as follows concerning the duty of plaintiff's agent at l. c. 260-261:

> "It has been held that if any length of time elapses between the making of the application and the issuing of the policy, it is the duty of the insurer to make inquiry when the policy is delivered as to the condition of the health of the insured, and if it fails to do so the delivery is conclusive against the insurer as to the completion of the contract. American Trust Co. v. Life Ins. Co. of Virginia, 173 N. C. 558, 92 S. E. 706; Grier v. Mutual Life Ins. Co., 132 N. C. 542, 546, 44 S. E. 28; National Life Ins. Co. v. Grady, 185 N. C. 348, 117 S. E. 289."

In the Hungate case two weeks elapsed between the application and delivery of the policy, to wit, July 31 to August 13. In the instant case **four** weeks elapsed, twice as long a period. The Court continues with reference to the cases last above cited by it:

> "The contracts in those cases contained provisions that they should not take effect until the first premium was paid, nor unless on the date of payment thereof the insured was alive and in sound health.
>
> "In the case at bar appellee (insurance company) construed the provision in the application to mean that before the actual delivery of the policy it should make inquiry as to whether the applicant had consulted a physician since her medical examination and if it was found that she had done so, the delivery of the policy would be withheld. This is apparent from the fact that when appellee sent the policy to the agent for delivery he was instructed that he should

not deliver it if the applicant had consulted a physician since her medical examination, and if she had he should return the policy to appellee."

In the case at bar, we repeat, Cusick did not take the stand. However, we assert, without fear of contradiction, that if the agent of the New York Life Insurance Company in the Hungate case had instructions not to deliver a policy if the applicant had consulted a physician since the medical examination, so likewise did Cusick have the same instructions from the same company in the case at bar. The logic of this conclusion is all persuasive and is inconsistent with any other possible conclusion. Whether he did or not, Illinois says, "It has been held that if any length of time elapses between the making of the application and the issuing of the policy, it is the duty of the insurer to make inquiry when the policy is delivered as to the condition of health of the insured and if it fails to do so the delivery is conclusive against the insurer as to the completion of the contract." Citations supra, l. c. 260-261. Continuing in the Hungate case, the Court says:

"The agent had been in the employ of appellee for six years and he says he knew the terms of the application and the policy. Before he delivered the policy he saw the applicant and her husband but did not ask either of them about her health or whether she had consulted a physician. **Under the cases above cited it was the duty of appellee to make inquiry, and having failed to do so the delivery should be held conclusive against appellee as to the completion of the contract.** The agent further testified that as far as he knew at the time, the delivery of the policy closed the transaction. If that was his conclusion after six years experience as agent for appellee why should the applicant, a woman without experience in such matters, be expected to know that it was her duty to inform the agent, without being interrogated, that she had consulted a physician? **There was no language in the application or policy that says she should do so.**"

In the matter at bar the insured and his wife, the respondent, did more than they were required to do under the law of Illinois which governs this case. Although ignorant of the provisions of the application and the policy, with which Cusick must have been thoroughly familiar, they both informed Cusick of the intervening examination and consultation with Dr. Walton. Cusick even was advised on March 17th, at the time he delivered the policy, that Chapman was going back to the doctor the next day. Yet with all this knowledge Cusick delivered the policy and closed the deal! (R. 104-105.)

The Hungate case clearly and unequivocally shows the duty under Illinois law that petitioner, through its agent, was bound to discharge, and just as clearly and unequivocally it fixes the consequences that are to be attached to petitioner's failure to discharge that duty. If it was the duty of the agent in the Hungate case to inquire as to consultation with a physician, then it must of course follow that, having discovered the fact, he must act accordingly and either refuse to deliver the policy or immediately advise the company. So in our case Cusick, being advised as to Chapman's consultation with a physician (R. 105-106), it was his affirmative duty not to deliver the policy, and to notify his company and let it determine the future course of action.

In Illinois not only is knowledge of the agent knowledge of the company, but, likewise, under the Hungate case the agent is obliged, where a period of time has elapsed, as at bar, between the date of the application and the delivery of the policy, to make inquiry as to the state of health of the insured and determine if he has consulted with or been treated by a physician. Therefore, if the agent fails to do so and yet delivers the policy, or if he does inquire and is advised of a consultation with or treatment by a physician and nevertheless delivers the policy, **the delivery is conclusive against the insurer as to the completion**

of the contract. By imposing the duty of inquiry, it necessarily follows that the knowledge so received is the company's knowledge. Otherwise, why require an inquiry? On reason alone and apart from authority, it is apparent that it is unfair to permit an insurance company perforce a restrictive provision in the application to hear nothing or see nothing. This, of course, is consistent with the holding of Illinois as exemplified by the Germania and other cases that knowledge of the agent is knowledge of the company.

Therefore, in view of the Hungate case, petitioner's argument that notice to the agent was not notice to the company, and that therefore the company had no notice of the insured's treatment by a physician between the date of his medical examination and the delivery of the policy, and that therefore the company could not be deemed to have waived any of its rights, is wholly lacking in merit. **The delivery of the policy completed the contract.**

We maintain that the decision of the Court of Appeals is not in conflict with the law of Illinois in determining that the contract at bar is an Illinois contract; that under the law of Illinois knowledge of the agent is knowledge of the principal, regardless of restrictions, and this particularly where the principal waives such restrictions, and is estopped from asserting them, and that, under the law of Illinois, delivery of the policy under the facts at bar was a completion of the contract.

Let us examine some of the cases cited and argued by petitioner with respect to the propositions of restricting an agent's powers and the inability of an agent to "make" a contract or waive a forfeiture.

The petitioner cites **Sommerio v. Prudential Life Ins. Co.**, 7 N. E. (2d) 631, and argues therefrom that a soliciting agent has no apparent authority to "make" a contract of insurance and hence that Cusick, a soliciting agent, had no such authority, wherefore petitioner is not bound by

the contract of insurance Cusick "made" with Chapman. This might be interesting if the question was involved in the matter at bar. **Cusick "made" no contract of insurance with Chapman. We have never so contended! The Court of Appeals never so found!** The petitioner and Chapman entered into a contract which Cusick delivered and accepted the premium for. Whatever knowledge Cusick acquired in the performance of this authorized act was the petitioner's knowledge and its subsequent conduct was its waiver and ratification of Cusick's acts.

Further, the application in the Sommerio case was never in fact approved or a policy issued. Under the cases cited and relied upon by petitioner, waiver and estoppel come into the case only when the insurance company, with knowledge through its agent, approves the application and issues the policy. It is because subsequently petitioner accepted and retained the four premiums that respondent can recover. **Further, petitioner made the policy conform to the agreement Cusick made.** Therein lies a distinction of substance and principle between the Sommerio case and the matter at bar.

Likewise, in **Winnesheik Ins. Co. v. Holzgrafe,** 53 Ill. 516, cited by petitioner, the insurance company rejected the application for the fire insurance policy. There was no issue of waiver or estoppel in the case. We can assume in the matter at bar that Cusick had no authority, actual or apparent, to make the agreement he did. Yet the fact remains that petitioner, through Cusick, had full knowledge of the facts and expressly ratified what he agreed to. In addition, petitioner accepted and retained the premiums. Petitioner is liable, not because of Cusick's apparent authority, but because (1) petitioner ratified what he did; (2) petitioner waived his lack of authority, and (3) petitioner is estopped from asserting his lack of authority. So the Court of Appeals held.

Likewise, **Pralle v. Metropolitan Life Ins. Co.,** 252 Ill.

App. 460, affirmed 178 N. E. 371, cited by petitioner, is not in point and is distinguishable because no policy was issued. Waiver and estoppel were not in the case.

Rummler v. Metropolitan Life Insurance Company, 45 N. E. (2d) 86, Illinois Appeals 1942, is also relied upon by the petitioner. In that case it appears that an agent for the company told the insured that if he would file an application to reinstate a lapsed policy and accompany the application with a check for the premium he would be reinstated without a medical examination. This the insured did. The company, upon receiving his application and check, immediately sent to the insured a **provisional** receipt which stated that the Company was holding his money until it could pass upon the application for reinstatement. The company subsequently advised the insured it would not reinstate him without a medical examination, whereupon he filed a suit to enjoin the company from cancelling the policy. Clearly in this case there was no question of waiver or estoppel by the company because the company, as soon as it received the money, advised the insured that it was not waiving anything, but was holding the money until it could investigate the application. In the matter at bar the New York Life Insurance Company received and retained without any reservation or question each premium that the insured paid and then, upon the insured's death, seeks to disaffirm the facts that it knew through its agent.

Petitioner also cites **Rozgis v. Mo. State Life Ins. Co.,** 271 Ill. App. 155, as authority that the agent having authority only to solicit applications has no power to waive the provisions of the policy. In that case an insured 66 years of age was denied recovery under a disability policy limiting such recovery to persons not over 60 years of age. There was no evidence in the case that the agent of the company had made any representations to the insured that such recovery could be had. This same Court of Ap-

peals some nine months later in **Micezey v. Mo. State Life Ins. Co.**, 273 Ill. App. 281, permitted recovery in a similar case where there was such evidence and where the agent was merely a soliciting agent. At 273 Ill. App. 281, the Court held:

> "It is the law of this state that notice to the insurance agent at the time of the application for insurance, of facts material to the risk is notice to the insurer, and such insurer cannot later repudiate the policy on account thereof. Provident Savings Life Assurance Society v. Cannon, 201 Ill. 260; Guter v. Security Benefit Ass'n, 335 Ill. 174."

Covenant Mutual Benefit Ass'n v. Conway, 10 Ill. App. 348, cited by petitioner as authority for the limited powers of the agent Cusick, is inapplicable for the same reason as the Pralle and other cases, supra. In this case the insured made application for insurance, which application by its terms had to be approved by the company before the insurance became effective. The agent supposedly told the insured he was covered from the time of the application. Death came to the insured before the company passed on the application and recovery was denied. Here again the company, unlike appellant in the case at bar, did nothing upon which waiver or estoppel was claimed and it was not an issue in the case.

Petitioner also cites **Rocca v. Metropolitan Life Insurance Company**, 300 Ill. App. 592, 21 N. E. (2d) 849, as authority for the proposition, namely, no agent is authorized to waive forfeitures or make, modify, or discharge contracts * * *, it being contended that the policy of insurance especially showed that the agent had no power to change the terms of the policy or waive a forfeiture.

It is contended that the assured in the Rocca case had prior notice of the agent's limited authority. The Rocca case and the language there used must of course be measured by the facts in relation to the language. This is ele-

mentary. This applies to all of petitioner's cases. So in the Rocca case and the other citations of petitioner it is fair to say that the mere language quoted when applied to the facts at bar certainly leaves no solace to petitioner. The language is appropriate to the facts in those cases, but, as the Court of Appeals quite properly found, the facts at bar are completely different. **In the first place, it must be borne in mind that we do not contend that Cusick waived anything.** It is the Company, we say, who waived any policy restriction by the acceptance of the immediate and subsequent premiums when under the law of Illinois it is unquestionably held that knowledge of the agent is knowledge of the company and, therefore, when the company accepted the premiums the company waived the restriction, having knowledge through its agent of the consultation with a physician.

In the Rocca case the agent told the assured that certain things would be done concerning the renewal of a policy and the payment of the premium. **These were not done and the policy in fact was never renewed.** Apparently the contention was made that the policy should have been renewed and that the agent had authority to make the promises he did with respect to the collection of certain dividends on the prior policy and their application to the renewal of the instant one and that hence the company was bound to carry out these promises. A mere statement of these facts is alone sufficient to evidence the difference between these facts and the case at bar.

In the light of the Germania, Mousette, Hungate and other cases cited and discussed by us, the Rocca case has not the slightest bearing. It is not in conflict with those cases or with our contention. The Court of Appeals so found.

CONCLUSION.

The Court of Appeals, in sustaining the findings and conclusions of the trial court, found the facts and drew legitimate inferences therefrom which it was entitled to do and which is not now the subject of review through the medium of this application. We believe that we have demonstrated to this Court that the Court of Appeals has properly held the policy to be an Illinois contract and likewise has scrupulously and correctly applied the law of Illinois both from the standpoint of its spirit and letter. Certainly the judgment is for the right party. The application should be denied.

Respectfully submitted,

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